(1)

91-986

Supreme Court, U.S.
FILED
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

CRAIG L. SHERMAN, PETITIONER

V.

UNITED STATES OF AMERICA, ET AL,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner should be discharged from the United States Air Force Reserve. On February 4,1991, the decision of the United States District Court held Petitioner had no Reserve obligation. The Respondents, contrary to the District Court's decision, placed Petitioner in the Reserves to serve until May 28, 1994. Petitioner appealed. The Eleventh Circuit Court of Appeals on August 20, 1991, held the issue of petitioner's discharge was not before them and affirmed the decision of the District court on September 16, 1991.

PARTIES

PETITIONER: Craig L. Sherman

RESPONDENTS: United States of America; Richard Gillis, Major General, Commander of Warner Robins Air Logistic Command; Michael C. Moehlencamp, Colonel, Commander of 5th Combat Communications Group; and Donald B. Rice, Secretary of the Air Force.

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OPINIONS OF COURTS BELOW

Petitioner filed a Writ a Habeas Corpus to obtain a discharge from the United States Air Force. The United States District Court at Macon, Georgia, issued a decision on February 4, 1991. The written decision of the District Court held that the Petitioner had no Reserve obligation. The pertinent part of the decision reads as follows:

> "The petitioner, Craig L. Sherman, is a sergeant in the United States Air Force. He enlisted for an eight-year term in the Air Force Reserve and agreed to serve on active duty for not less than four years. This was later changed so that he was to serve four years' active duty only. He entered active duty on November 28, 1986 and was

assigned to the 51st Combat Communications Squadron, 5th Combat Communications Group at Robins Air Force Base, Georgia. His term of active duty was to expire on November 27, 1990."

Thereafter on May 25, 1991, the Respondents placed Petitioner in the Air Force Reserves to serve until May 28, 1994. The Eleventh Circuit Court of Appeals held in their written decision on August 20, 1991, that the issue of Petitioner's discharge was not litigated in the District Court, therefore, not before them and dismissed the appeal. The Appellate Court's decision reads as follows:

"We find that the matters relating to appellant's discharge from the Air Force were not litigated in the district court; therefore, we do not

consider them here, on appeal. All other issues in the case are moot."

On September 16, 1991, the Appellate Court affirmed the decision of the District Court.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals dismissing the appeal was entered August 20, 1991. The judgment of the Eleventh Circuit Court of Appeals affirming the judgment of the District Court was filed September 16, 1991. The jurisdiction of the United States Supreme Court for the Writ of Certiorari is invoked pursuant to 28 U.S.C section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves Article I, Section 9, clause 2 of the United States Constitution. Said section reads as follows:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."

STATEMENT OF THE CASE

Petitioner filed a Writ of Habeas Corpus in the United States District Court at Macon, Georgia on January 25, 1991. The District Court had jurisdiction pursuant to 28 U.S.C. section 2241. Petitioner and the appropriate Respondents were within the territorial jurisdiction of the District Court 28 U.S.C. section

90(b). The purpose of the Writ was for the Petitioner to obtain an honorable discharge from the United States Air Force. Petitioner was on active duty in the United States Air Force at the time he filed the Writ of Habeas Corpus. Respondents had involuntarily extended Petitioner's contract of active duty enlistment for an indefinite period due to the war in the Middle East (Desert Storm). Petitioner's contract of enlistment had expired on November 27, 1990 and Petitioner had no Reserve obligation. At the trial in the District Court the Petitioner testified as to the Reserve Obligation as follows:

Q. Mr. Sherman, I'll hand you what has been marked plaintiff's exhibit 1. What is that, Mr. Sherman?

A. This is an enlistment contract.

Q. And how many pages did I hand you.

A. Two pages.

Q. And Mr. Sherman, have you seen this document before?

A. Yes, I have.

Q. And on the back of that first page, I believe, is that your signature?

A. Yes it is.

Q. And that is dated what?

A. May 29th, 1986.

Q. All right. Is that when you signed that?

A. Yes, it is.

THE COURT: Excuse me just a second. I thought I had a copy. In fact, I know I've seen it, but I can't find it now.

MR. SHERMAN: Let me hand you a copy here, Your Honor.

THE COURT: Oh, here it is. Excuse me. I've got it.

MR. SHERMAN: I don't know that you have both pages.

THE COURT: All right.

MR. SHERMAN: I will also provide counsel with those pages.

Q. By Mr. Sherman: And what was your understanding when you signed that contract of your obligation to the United States Air Force?

A. Four years active duty service.

Q. When you signed it on May of 1986, was it then a four year:

A. No, it wasn't.

Q. What was it?

A. It was an eight year Reserve commitment.

Q. Was it your understanding that that would change as time went on?

A. Yes. It was my understanding that when I enlisted in active duty service that would change.

Q. What would it change to?

A. A four year active duty commitment.

Q. And would you have any Reserve to serve after that?

A. No.

Q. All right. I point out to you that on that first page there on Number 8, it does state an eight year commitment in the reserves; is that right?

A. That's right.

Q. And that's the paragraph Number 8; is that true? You'll have to say yes or no.

A. Yes.

Q. And then, Mr. Sherman, on that second page that I handed you, is that your signature on that second page?

A. Yes, it is.

Q. And by your signature, is that--what is the date?

A. Tell me what subsection.

Q. No, what is the date by your signature?

A. May, 29th 1986.

Q. I'm on the second document.

A. All right.

THE COURT: Can you hear the witness? Mr. Goulian can you hear him all right?

MR. GOULIAN: I can hear him.

THE WITNESS: Paragraph 20(a)?

Q. Paragraph 20(a)(b).

MR. SHERMAN: May I approach the witness and point out the paragraph, Your Honor?

THE COURT: Yes, and you are going to have to do it for me. Mine stops with 19(a).

(Counsel approaches witness)

THE COURT: All right. Go ahead.

Q. BY MR. SHERMAN: And what is the date by your signature on that 20(a)?

A. November 28th, 1986.

Q. So you signed the document first in May of 1986; is that right?

A. Yes.

Q. And is this the one that states that you went in for four years?

A. Yes.

Q. And it does state that in 20(a), to your opinion

A. Yes.

Q. And then in 21(a), what does that state?

A. That I am discharged from the Reserve Component shown in Item 8 and accepted in regular order, United States Air Force.

Q. Now, then that says Reserve Component shown in Item 8?

A. That's right.

Q. Is that what Item 8 on that first page that you talked about where your signature was in May?

A. Yes.

Q. Okay. So that is the one, the paragraph that says you have an eight year commitment to the

Reserves and then on the next page where it says you are discharged from that eight year commitment; is that your understanding?

A. Yes.

Q. You have no Reserve commitment after you have served your four years in the regular Air Force; is that your understanding?

A. Yes.

MR. SHERMAN: Offer into evidence, Your Honor, Petitioner's Exhibit 1.

THE COURT: Mr. Goulian, any objections?

MR. GOULIAN: Your Honor, I don't have any cross because I think everything he said is irrelevant to the proceedings.

THE COURT: Do you have any objection to his tendering of this enlistment contract?

Mr. GOULIAN: No, no objection.

THE COURT: How many pages is it?

MR. SHERMAN: Let the record show that this is a two-page document, but there is printing on both sides. So when the copies are made, there are four copies.

THE COURT: All right. Make sure yours and mine--all right. Plaintiff's Exhibit 1, Petitioner's Exhibit 1 is admitted without objection.

In accordance with the testimony the District Court on February 4, 1991 issued its judgment which reads in pertinent part as follows:

"The petitioner, Craig L. Sherman, is a sergeant in the United States Air Force. He enlisted for an eight-year term in the Air Force Reserve and agreed to serve on active duty for not less than four years. This was later changed so that he was to serve four years' active duty only. He entered active duty on November 28, 1986, and was assigned to the 51st Combat Communications Squadron, 5th Combat Communications Group at Robins Air Force Base, Georgia. His term of active duty was to expire on November 27, 1990."

Although the District court ruled in favor of the Petitioner that (1) his contract of enlistment expired on November 27, 1990, and (2) he had no Reserve obligation, the District Court denied the

petitioner a discharge holding the President had authority to involuntarily extend enlistments due to the war in the Middle East. Further, the District Court judgment reads in pertinent part as follows:

> " If the law were clear that Petitioner is entitled to be discharged, then this court would order him discharged."

The Petitioner appealed the judgment of the District Court. The Respondents did not appeal the District Court judgment. Before Petitioner's appeal came to a hearing in the Eleventh Circuit Court of Appeals, the Middle East war ended. Respondents issued Petitioner an Honorable Release from active duty beginning May 25, 1991, but placed Petitioner in a Reserve obligation until May 28, 1994. The Petitioner presented only one issue at the

appeal hearing held August 14, 1991, and that issue was "Whether petitioner is entitled to an honorable discharge upon release from active duty." The term discharge is defined at 32 CFR 41.6(b) (1990 ed) as complete severance from all military status gained by the enlistment or induction concerned. On August 20, 1991, the appellate court in its written decision held:

> "We find that the matters relating to appellant's discharge from the Air Force were not litigated in the district court; therefore, we do not consider them here, on appeal. All other issues in the case are moot."

The appellate court's written judgment filed September 16, 1991, affirmed the District court decision. Although the District Court held the Petitioner had no

Reserve Obligation, the Appellate Court refused to discharge the Petitioner from the Reserves.

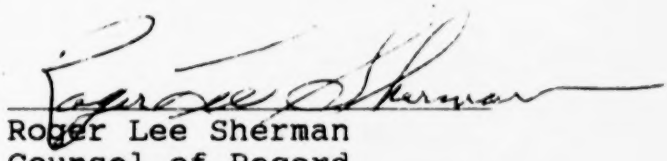
REASON FOR GRANTING THE WRIT

This case should be heard by the United States Supreme Court because the Petitioner has no other remedy. This case is Res Judicata as to all courts of the United States except this Supreme Court. Federal Dept. Stores Inc. v. Moitie 452 U.S. 394, 69 L. Ed 2d 103, 101 S. Ct. 2424 (1981)

The Federal District court has ruled the Petitioner has no Reserve obligation. In disregard of the District court ruling the Respondents placed Petitioner in a Reserve obligation until May 28, 1994. The Court of Appeals affirmed the District Court decision. The District court decision therefore remains valid and,

therefore Petitioner has no Reserve obligation. Petitioner has no means to enforce the District Court decision except by this petition to the United States Supreme Court.

Furthermore, the Eleventh Circuit Court of Appeals was in error in their judgment that the issue of Petitioner's discharge was not tried in the District Court. The entire proceeding on the Writ of Habeas Corpus before the District Court was on the issue of Petitioner's discharge as evidenced by the wording of the judgment of the District Court.



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APPENDIX

1. Judgment dated February 4, 1991, of the United States District Court for the Middle District of Georgia.
2. Judgment dated August 20, 1991, of the Eleventh Circuit Court of Appeals.
3. Judgment filed September 16, 1991, of the Eleventh Circuit Court of Appeals.

IN THE UNITED STATES DISRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

CRAIG L. SHERMAN,	:	
Plaintiff,	:	
vs.	:	CIVIL ACTION
UNITED STATES OF AMERICA,	:	NO. 91-33-3-
ET AL.,	:	MAC (DF)
Defendants.	:	

JUDGMENT

Pursuant to the order of this court which was dated and filed February 4, 1991, and for the reasons stated therein, the petition for a writ of habeas corpus is denied.

Judgment is therefore entered in favor of the defendants.

This 4th day of February, 1991.

GREGORY J. LEONARD, Clerk
By: (SIGNED)
Elaine W. Jones
Deputy Clerk

Filed at 5:28 p.m.
February 4, 1991
Deputy Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

CRAIG L. SHERMAN,	:	
Petitioner,	:	
vs.	:	CIVIL ACTION
UNITED STATES, et al.,	:	FILE NO.
Respondents	:	91-33-3-MAC (DF)

FITZPATRICK, District Judge

This petition for a writ of habeas corpus presents the court with an important question concerning the armed forces at a time when our nation is engaged in a war in the Middle East. More specifically, the issue is whether the President has the authority under 10 U.S.C. Section 673c to involuntarily extend the term of enlistment for an active member of the Air Force. The court holds that he does, and so the petition is DENIED.

I. BACKGROUND

The petitioner, Craig L. Sherman, is a sergeant in the United States Air Force. He enlisted for an eight-year term in the Air Force Reserve and agreed to serve on active duty for not less than four years. This was later changed so that he was to serve four years' active duty only. He entered active duty on November 28, 1986, and was assigned to the 51st Combat Communications Squadron, 5th Combat Communications Group at Robins Air Force Base, Georgia. His term of active duty was to expire on November 27, 1990.

An unforeseeable series of events intervened. On August 2, 1990, Iraq invaded and occupied Kuwait. On that same day, President George Bush issued Executive Order 12722, declaring a national emergency. Executive Order 12728, issued on August 22, delegated the

President's authority under 10 U.S.C. Section 673c to the Secretary of Defense. That same Order allows the Secretary of Defense to redelegate this authority without the approval of the President. The Secretary passed this power to the Secretary of the Air Force, who in turn delegated it to the Assistant Secretary for Manpower, Reserve Affairs, Installations and Environment, who then announced the suspension of those provisions of law and Air Force policy relating to the separation, retirement and promotion of personnel deemed to be in an essential category by the Secretary of Defense. This same procedure was followed with later executive orders authorizing the calling up of other reserve units and the extension of their terms of service.

This plan, known as a "Stop Loss" program, originally applied to personnel with dates of separation or retirement

between October 2 and December 31, 1990, although the latter date was given as tentative in an announcement of September 17, 1990. This same announcement identified those personnel whose units or Air Force Specialty Codes (AFSC), which are numerical designations of job titles, were essential to national security and therefore subject to the Stop Loss program. A later statement extended Stop Loss indefinitely past December 31 and deleted Petitioner's AFSC from the list of critical skills, although his unit remained designated as essential. After the deadline declared by the United Nations for Iraq to leave Kuwait passed on January 15, war began on the next day. A January 25, 1991, announcement removed Petitioner's unit from the list of critical units but adding his AFSC back to the list of critical skills.

These events had a direct impact on the Petitioner. His unit was shipped to Saudi Arabia on August 16, 1990, but he was left behind due to a broken finger. Before the Stop Loss program was implemented he volunteered, for unexplained reasons, to rejoin his unit, but permission was denied since he had so little time left on his enlistment contract and did not wish to extend it. After the Stop Loss order went into effect, Petitioner in the latter part of October or the first of November orally applied for a hardship waiver, which was denied. He then took three weeks' leave to be married. After receiving his second Stop Loss order, Petitioner filed a written request for a waiver on January 10, 1991, and then again went on leave, returning on January 25, the same day this petition was filed. On January 28,

Petitioner received notice that his second request was also denied and that he was shortly to be shipped overseas.

Since this is a matter requiring the immediate attention of this court due to the fact that Petitioner's orders have already been sent directing him to depart Robins Air Force Base for duty with Operation Desert Storm in the Kingdom of Saudi Arabia on February 8, 1991, the court will not delay its ruling on the writ of habeas corpus and will instead issue its order forthwith.

II. DISCUSSION

The first issue raised by the Petitioner concerns which statute controls his case. He contends that the controlling statute is 50 App. U.S.C. Section 454(c)(1), which forbids involuntary extensions of enlistments without a declaration of war or national

emergency by Congress, while the government relies on 10 U.S.C. Section 673c (West Supp. 1990). The court is persuaded that Section 673c controls, in part because it was enacted at a later date, and the court is willing to believe that Congress was well aware of the existence of Section 454 while considering Section 673c, and so took the older statute into consideration. Contrary to Petitioner's claims, the court finds that Section 673c acts as a specific exception to the prohibition on involuntary extensions found in Section 454, a broader and more general statute. Section 673c therefore controls this case.

The question to be decided by the court is whether section 673c gives the President the authority to extend the enlistment of an active duty Air Force enlisted man as well as a member of the

Air Force Reserve. The statute reads:

> Notwithstanding any other provision of law, during any period members of a reserve component are serving on active duty pursuant to an order to active duty under authority of section 672, 673 or 673b of this title, the President may suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.

10 U.S.C.A. Section 673c(a) (West Supp. 1990). (Sections 672, 673 and 673b, to which the statute refers, concern reserve components generally, the ready reserve

and selected reserve, respectively.) The answer to the question asked above is "yes."

The Petitioner contends that since the statute begins by referring to members of a reserve component, the rest of it must be read to concern the reserves only. This court cannot, however, read the statute in that manner. Although the statute begins by referring to the reserves, it ends by referring to "any member of the armed forces who the President determines is essential to the national security of the United States." A more logical reading would lead to the conclusion that Congress intended to provide for the authority of the President to extend the enlistment of members of the armed forces, regular or reserve, if and when "members of a reserve component are serving on active duty pursant to an

order to active duty." The statute ends after stating that the President may suspend any provision of law relating to separation applicable to any member of the armed forces who the President determines is essential to national security.

The legislative history of the statute clearly indicates the will of Congress by the use of the following language:

> "The effectiveness of the President's call-up authority is weakened furher by the normal separation or retirement of regular and reserve personnel. At the very time that he has augmented the active forces to respond to a crisis, the President lacks the authority to prevent the loss of regular and reserve personnel who become

eligible to separate or retire

from the military services....

Sen. No. 98-174, 98th Cong., 1st Sess, 2, reprinted in 1983 U.S. Code Cong. & Admin. News, 1081, 1098 (emphasis added).

The Petitioner has also challenged the determination that he is essential to national security as required by the statute. The court is not willing to challenge this finding. In a time of war, the military decisions made by the President and the executive branch carry a special weight. Such decisions have been left to the discretion of the President by the very language of Section 673c, and this court would be overstepping its bounds to challenge such a decision. Moreover, although Petitioner has labored mightily to show that he is not essential, the government has presented convincing evidence that he is.

Furthermore, adopting the Petitioner's reading of Section 673c would lead to an illogical and inequitable result. It would make little sense to say that the President is allowed to call up or extend the enlistments of reservists in case of war but that he cannot do so for active duty personnel. Although the Petitioner has claimed that extending his enlistment would cause him undue hardship, this court is well aware of the even greater hardships experienced by members of the reserves who have been taken away from their families and civilian careers. In a time of war it would be terribly unfair and unreasonable to allow such disruptions to affect reservists, but not members of the regular armed forces.

In a nutshell, the Petitioner has asked this court to order the termination of his contract as an enlisted man in the

United States Air Force in time of war, a decision which would trigger lawsuits and claims by other military personnel similarly situated and bring chaos to orderly military planning. If the law were clear that the Petitioner is entitled to be discharged, then this court would order him discharged. In this opinion of this court, however, the law does not favor the Petitioner and it would be unreasonable to read the statute that way. The language of the statute, its legislative history, the discretionary decisions made by the executive branch and basic notions of fairness all convince the court that the Petitioner's case must fail. Accordingly, the petition for a writ of habeas corpus is DENIED.

SO ORDERED, this 4th day of February, 1991.

(signed)

DUROSS FITZPATRICK, JUDGE

UNITED STATES DISTRICT COURT

MEM/bb

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8204

D. C. Docket No. CIV91-33-3-MAC (DF)

CRAIG L. SHERMAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA;
RICHARD GILLIS, Major General,
Commander of Warner Robins Air
Logistic Command; MICHAEL C. MOEHLENKAMP,
Colonel, Commander of 5th Combat
Communications Group and DONALD B. RICE,
Secretary of Air Force,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

(August 20, 1991)

Before TJOFLAT, Chief Judge, HATCHETT, Circuit Judge, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

We find that the matters relating to appellant's discharge from the Air Force were not litigated in the district court; therefore, we do not consider them here, on appeal. All other issues in the case are moot.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8204

D. C. Docket No. CIV91-33-3-MAC (DF)

CRAIG L. SHERMAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA;
RICHARD GILLIS, Major General,
Commander of Warner Robins Air
Logistic Command; MICHAEL C. MOEHLENKAMP,
Colonel, Commander of 5th Combat
Communications Group and DONALD B. RICE,
Secretary of Air Force,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

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Before TJOFLAT, Chief Judge, HATCHETT, Circuit Judge and HENDERSON, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: August 20, 1991

For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb

Deputy Clerk

ISSUED AS MANDATE: Sept. 16, 1991

(2)

No. 91-986

Supreme Court, U.S.
FEB 10 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

CRAIG L. SHERMAN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner, a member of the Air Force whose active duty was extended during the Persian Gulf War, did not litigate in the district court the issue whether he had a reserve obligation remaining after expiration of the extension of his active duty.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-986

CRAIG L. SHERMAN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. Doc. 2) is unreported. The opinion of the district court (Pet. App. Doc. 1) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. Doc. 3) was entered on August 20, 1991. The petition for a writ of certiorari was filed November 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 29, 1986, petitioner enlisted in the Air Force Reserve. Pet. 9. Upon enlisting, petitioner agreed to serve a total of eight years, at least four

years of which was to include active duty. Pet. App. Doc. 1, at 2. On November 28, 1986, petitioner enlisted for a four-year tour of active duty in the United States Air Force. *Ibid.* Shortly before November 27, 1990, when his active duty tour was scheduled to expire, events in the Persian Gulf intervened. A "Stop Loss" order was issued regarding petitioner's unit, which had the effect of suspending petitioner's separation date from active duty.[1] *Id.* at 2-5. Petitioner filed a request for a hardship waiver of the stop loss order, which was denied. Petitioner thereafter filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, the judicial district in which he was stationed.

2. The sole issue presented in petitioner's habeas corpus petition was the validity of the stop loss order respecting his unit. Petitioner made no allegation respecting whether he had a reserve obligation following his release from active duty. C.A. Record Excerpts Tab 2. The district court held that the stop loss order was valid, and accordingly denied the petition. Pet. App. Doc. 1, at 6-14.

During the trial in the district court, petitioner testified on direct examination that he understood the papers he signed when he entered on active duty to release him from his previously-assumed reserve commitment. Pet. 5-13. Government counsel declined to cross examine petitioner on the issue, stating that the testimony was "irrelevant to the proceedings." *Id.* at 12. In the portion of its opinion containing

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[1] By statute, the President has so-called "stop loss" authority, which entitles him to "suspend any provision of law relating to * * * separation applicable to any member of the armed forces who [he] determines is essential to the national security of the United States." 10 U.S.C. 673c(a).

factual findings, however, the district court stated that petitioner had "enlisted for an eight-year term in the Air Force Reserve and agreed to serve on active duty for not less than four years. This was later changed so that he was to serve four years' active duty only." Pet. App. Doc. 1, at 2. Aside from this isolated statement, the district court did not mention or analyze the extent of petitioner's reserve obligation at any other point in its 14 page opinion.

3. Shortly after petitioner took an appeal from the dismissal of his petition for habeas corpus, he was issued a Certificate of Release or Discharge from Active Duty, with an effective date of May 25, 1991. See Gov't C.A. Br. Addendum. Instead of a complete discharge, however, the Certificate transferred petitioner to the Air Force Reserve and provided that his "Reserve Obligation Termination Date" was May 28, 1994 (eight years after his original enlistment in the Air Force Reserve). *Ibid.*

4. In the court of appeals, petitioner argued that the district court erred in upholding the validity of the President's extension of his active duty. Petitioner also argued that he was released from the reserve obligation he had undertaken upon his original enlistment, Pet. 14-18, as a result of the district court's statement that, upon signing up for active duty, petitioner's total service obligation "changed so that he was to serve four years' active duty only." Pet. App. Doc. 1, at 2. Petitioner argued that he was accordingly entitled to an order discharging him from the Air Force Reserve.

The court of appeals affirmed the judgment of the district court in the following two-sentence order (Pet. App. Doc. 2, at 2):

> We find that the matters relating to appellant's discharge from the Air Force were not

litigated in the district court; therefore, we do not consider them here, on appeal. All other issues in this case are moot.

This petition for certiorari followed.

ARGUMENT

The court of appeals correctly determined that the issue of petitioner's reserve obligation following his release from active duty was not litigated in the district court, and thus could not be raised on appeal. The only issue that could be raised on appeal—the validity of the stop loss extension of petitioner's active duty—became moot when the Gulf War ended and petitioner was released from active duty while his appeal was pending, and petitioner does not contend otherwise.

While the petition for a writ of habeas corpus (C.A. Record Excerpts Tab 2) asked the court to discharge petitioner "from the United States Air Force" (*id.* at 3), the body of the petition was addressed exclusively to the stop loss issue. Petitioner did not even raise the issue whether his active duty contract released him from his previously-agreed upon reserve obligation. Nothing in the district court's legal discussion (Pet. App. Doc. 1, at 6-13) purports to discuss the issue of petitioner's reserve obligation, the resolution of which would depend upon an analysis of the enlistment documents as well as the governing statute and regulations regarding petitioner's length of service obligation.[2]

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[2] We note that Congress by statute has precluded the Air Force from releasing petitioner from his reserve obligation except on the ground of personal hardship. 10 U.S.C. 651(a) provides:

> Each person who becomes a member of an armed force [subject to an exception for ROTC members] shall serve

Petitioner argues (Pet. 17-18), however, that the district court's offhand statement of fact regarding petitioner's service obligation—which, as the government stated at trial, was irrelevant to the issues in the case—constituted an adjudication of the point. To the contrary, as the court of appeals' decision makes clear, the issue was neither raised nor decided in the district court. The government argued in the court of appeals (Gov't C.A. Br. 12-13) that petitioner's testimony was not sufficient to raise the issue; and, in refusing to pass on the issue, the court of appeals agreed. We fail to see how the court of appeals could have concluded otherwise, in light of the issue's irrelevance to petitioner's claim, the lack of briefing or argument in the district court on the point, and the district court's failure to analyze the issue.

Nor is petitioner correct that the district court's judgment precludes him from litigating the extent of his reserve obligation in another suit. There could be no serious argument that either claim or issue preclusion attached to the district court's isolated

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> in the armed forces for a total initial period of not less than six years nor more than eight years, as provided in regulations prescribed by the Secretary of Defense * * * unless such person is sooner discharged under such regulations because of personal hardship. Any part of such service that is not active duty or that is active duty for training shall be performed in a reserve component.

A Defense Department Directive (DoD Directive 1304.25 (Mar. 17, 1986)), and an Air Force regulation, AFR 35-41, provide that for persons enlisting on or after June 1, 1984, the military service obligation is eight years and that any portion not served on active duty shall be performed in a Reserve component. Petitioner does not suggest, and there is no basis for suggesting, that he was discharged from his reserve obligation on the ground of personal hardship.

statement on an issue that was neither actually litigated, nor necessary—or even related—to the claim that the district court did decide.[3] Even if such a baseless argument were made in a subsequent case, the court of appeals' decision here, which expressly states that the issue was not litigated in the district court, would pose an insurmountable barrier—if, indeed, it would not itself be preclusive on the issue of preclusion.

Finally, apart from the fact that petitioner's argument is wrong on the merits, this case does not present any issue of general importance warranting this Court's review.

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[3] The issue of petitioner's reserve obligation was neither "actually litigated" in the district court, nor was it "a critical and necessary part of [that court's] judgment." *Greenblatt* v. *Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985). The district court's statement relating to that issue is therefore not entitled to preclusive effect. See, *e.g.*, *In re Miera*, 926 F.2d 741, 743 (8th Cir. 1991); *Peck* v. *Commissioner of Internal Revenue*, 904 F.2d 525, 527 (9th Cir. 1990); *Greenblatt* v. *Drexel Burnham Lambert, Inc.*, 763 F.2d at 1360; *DeWeese* v. *Town of Palm Beach*, 688 F.2d 731, 733 (11th Cir. 1982).

As to claim preclusion, we do not believe that the issue of petitioner's reserve obligation was a necessary part of his "claim" relating to the extension of his active duty. He therefore should not be barred from litigating that separate claim in a subsequent case. See, *e.g.*, *Lubrizol Corp.* v. *Exxon Corp.*, 929 F.2d 960, 963 (3d Cir. 1991); *Aliff* v. *Joy Mfg. Co.*, 914 F.2d 39, 42-43 (4th Cir. 1990); *Barnett* v. *Stern*, 909 F.2d 973, 977-978 (7th Cir. 1990); *In re Howe*, 913 F.2d 1138, 1143-1144 (5th Cir. 1990); see also Restatement (Second) of Judgments § 24(1) (1982). The factual and legal bases for the claim that petitioner did pursue (alleging the invalidity of the stop loss order extending his active duty) were distinct from any possible basis for the claim that he did not pursue (that he was released from his reserve obligation when he signed up for active duty).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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